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UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 SAN JOSE DIVISION

NATIONAL URBAN LEAGUE, et al.,

Plaintiffs,

v.

WILBUR L. ROSS, JR., et al.,

Defendants.

CASE NO. 5:20-cv-05799-LHK

**PLAINTIFFS' OPPOSITION TO
 DEFENDANTS' REQUEST FOR RULE
 502(D) ORDER**

Place: Courtroom 8
 Judge: Hon. Lucy H. Koh

1 Plaintiffs strongly oppose Defendants’ Request For Rule 502(d) Order (“Request”) (Dkt.
 2 388) and the proposed order accompanying it. As Defendants note in their Request, the parties
 3 had been engaged in good faith negotiations regarding the specific terms of a clawback
 4 agreement. Request at 1. Rather than continuing negotiations, however, Defendants informed
 5 Plaintiffs that they would instead seek a 502(d) Order on their own, ignored Plaintiffs’ request to
 6 file a joint statement explaining the parties’ positions, and proceeded to file their Request 10
 7 minutes later, containing positions and citations to cases Defendants had never raised with
 8 Plaintiffs (but which, as discussed below, do not support Defendants’ position).

9 As Defendants note, Plaintiffs were and remain agreeable to a normal course clawback
 10 agreement. One that states that the parties may claw back privileged materials *inadvertently*
 11 disclosed, without fear of waiver, subject to detailed procedures laid out in the agreement.
 12 Defendants, however, insist that a clawback agreement must be put in place immediately to (1)
 13 cover all disclosure of privileged material, inadvertent **or advertent**, without fear of waiver—
 14 thereby allowing Defendants to cherry-pick privileged material for disclosure without the worry
 15 of subject matter waiver on items unhelpful for Defendants; and (2) fully displace the
 16 requirements set forth in Federal Rule of Evidence (“Rule”) 502(b)(1), ensuring that Defendants
 17 do not need to do any sort of reasonable review at all of potentially privileged materials.

18 In other words, via a “Request” barely one and a half pages long, and in expedited
 19 fashion, Defendants now seek to obtain something they could not achieve via agreement between
 20 the parties and that normally would be sought through a normal noticed motion—a clawback
 21 order that is the opposite, in key respects, to principles contained in the Federal Rules of
 22 Evidence. *See Abington Emerson Capital, LLC v. Landash Corp.*, No. 2:17-CV-143, 2019 WL
 23 3521649, at *2 (S.D. Ohio Aug. 2, 2019) (“Parties are free to contract for additional protections
 24 beyond those provided in the Rule...[b]ut where the parties cannot agree on additional
 25 protections beyond those provided in the Rule, the Court is reluctant to impose them absent
 26 exceptional circumstances.”). Plaintiffs respectfully submit that the Court should reject this, for
 27 the following reasons.

1 First, Defendants’ “Request” is procedurally improper. Over one month ago—on a meet
 2 and confer prior to the November 13, 2020 CMC in this case—Plaintiffs asked Defendants’
 3 counsel whether they wanted to agree to and seek entry of a standard protective order in this
 4 case. Defendants brushed off the suggestion. That was their choice—but poor planning on
 5 Defendants’ part does not and should not create an emergency on the Court’s (or Plaintiffs’ part).
 6 If Defendants want a broad, aggressive version of a clawback agreement to be put in place over
 7 Plaintiffs’ objection, they should file an ordinary-course motion (or even an expedited request for
 8 a motion on a shortened time frame) and allow these issues to be appropriately briefed and
 9 considered.

10 Second, omitting the concept of “inadvertent” from the agreement would permit
 11 Defendants to broadly claw back documents after any and all disclosures, inadvertent or
 12 advertent, rather than permitting them to claw back only the narrower category of mistakenly
 13 disclosed documents. There is no justification for this. *See Abington*, 2019 WL 3521649, at *3.
 14 And that would also allow them to permit disclosure of privileged materials that support
 15 Defendants’ case without fear of opening the door to subject matter waiver over the privileged
 16 materials that *undercut* Defendants’ case. In their short Request, Defendants do not address this
 17 possibility, or that Defendants’ proposed order would permit Defendants to shirk their duty to
 18 conduct privilege review, only to recall large quantities of documents at a later date. In
 19 Plaintiffs’ view, this would likely exacerbate the ongoing delays in the expedited fact discovery
 20 period. And Plaintiffs wish it were otherwise, but Defendants assurance that “Defendants have
 21 represented to Plaintiffs, and now to this Court, that they have no intention of attempting to claw
 22 back large volumes of documents post production” is scant comfort in this case, where
 23 Defendants’ defiance of their obligations and Court orders have unfortunately been a regular
 24 occurrence, and their actions speak far louder than words. Dkt. 388 at 1.

25 Third, Defendants’ requested insertion of unnumbered paragraph two is similarly
 26 problematic. By eliminating the requirements of Rules 502(b)(1) and (2), Defendants’ paragraph
 27 (i) again removes the “inadvertent” requirement, and also (ii) eviscerates any assurance that
 28 Defendants are conducting a reasonable privilege review prior to producing documents. In doing

1 so, it creates a privilege scheme for this case that largely absolves Defendants of any
 2 responsibility whatsoever, or the careful guidelines of Rule 502(b), while simultaneously giving
 3 them the ability to use privilege both as a sword and shield.

4 Defendants do not offer the Court any substantive reason for why a Court-ordered, broad
 5 clawback agreement such as this—over Plaintiffs’ objections, and in circumstances where any
 6 urgency is entirely of Defendants’ deliberate decisions to refuse timely compliance with their
 7 discovery obligations—is advisable. Instead, their argument boils down to this: “Plaintiffs’
 8 proposed edits, which would delete any reference to the clawback displacing Fed. R. Evid.
 9 502(b), would defeat the very purpose of a clawback order,” because apparently it is “standard”
 10 to supplant FRE 502(b) in clawback agreements and to allow parties to claw back privileged
 11 materials advertently, intentionally or voluntarily produced. Dkt. 388 at 1.

12 One might imagine such a pronouncement would have a battalion of citations in support.
 13 Not here. While Defendants correctly note that clawback agreements permit parties to contract
 14 around the requirements of Rule 502(b), the very case Defendants rely on plainly states that “the
 15 requirements of Rule 502(b) can be superseded by a clawback agreement *only* to the extent such
 16 an order or agreement [provides] *concrete directives* regarding each prong of Rule 502(b) *i.e.*,
 17 (1) what constitutes inadvertence; (2) what precautionary measures are required; and (3) what the
 18 privilege holder’s post production responsibilities are to escape waiver.” *Irth Sols., LLC v.*
 19 *Windstream Commc’ns LLC*, No. 2:16-cv-219, 2017 WL 3276021, at *11 (S.D. Ohio Aug. 2,
 20 2017) (quoting *Burd v. Ford Motor Co.*, No. 3:13-CV-20976, 2015 WL 1650447, at *6 (S.D. W.
 21 Va. Apr. 14, 2015) (emphasis added) (internal quotation marks omitted)). Thus, the purpose is
 22 not to always “supplant” 502(b) entirely, as Defendants argue. A clawback agreement can of
 23 course still serve a valuable purpose by crystallizing what procedures the parties will abide by to
 24 avoid a waiver. Indeed, Defendants’ counsel at DOJ never once say otherwise. They cannot, in
 25 good faith, given the many different sorts of clawback agreements/protective orders DOJ enters
 26 into—many of which assuredly do not always supplant 502(b) and protect advertent/intentional
 27 production of select privileged materials (as the lack of any DOJ declaration on this issue
 28 attests). While Rule 502(d) “*may* provide for return of documents without waiver irrespective of

the care taken by the disclosing party,” nothing requires such a broad approach as Defendants argue. Fed. R. Evid. 502(d) advisory committee’s notes (emphasis added); *see also Abington Emerson*, 2019 WL 3521649, at *2.

Plaintiffs respectfully request that the Court deny Defendants’ request. Plaintiffs will continue to work in good faith with Defendants to agree to, and submit for entry, an appropriate clawback agreement as set forth herein..

Dated: December 17, 2020

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ATTESTATION

I, Sadik Huseny, am the ECF user whose user ID and password authorized the filing of this document. Under Civil L.R. 5-1(i)(3), I attest that all signatories to this document have concurred in this filing.

Dated: December 17, 2020

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